A

MOHD HAZRIN MD SARI

v.

PP

B

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
SULONG MATJERAIE JCA
SULAIMAN DAUD JCA
[CRIMINAL APPEAL NO: P-05-42-2003]

C

25 MARCH 2008

CRIMINAL PROCEDURE: *Trial - Trafficking in cannabis - Defence case - Misdirection in law - Failure to put defence case to prosecution witness - Whether defence case not to be believed - Failure to mention*

D

defence case in statements to police - Drawing of adverse inference thereof - Whether a serious misdirection - Dangerous Drugs Act 1952, s. 39B(1)(a)

EVIDENCE: *Adverse inference - Right to silence - Whether a fundamental right of accused - Failure to relate defence case in statements*

E

to police - Whether of no consequence - Drawing of adverse inference from failure - Whether imposing duty not imposed by law on accused - Whether a serious misdirection

The appellant was convicted of an offence of trafficking in 48666

F

grams of cannabis under s. 39B(1)(a) of the Dangerous Drugs Act 1952 and was sentenced to death when the proscribed drugs were found in the car he was driving. The learned trial judge, in rejecting the appellant's defence that he was a mere innocent carrier of the drugs, and that the three gunny bags of cannabis

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could have been put in the boot of the car by one Badrol Hisham or Badrol Hisham's two friends or the informer who tipped off PW5 – ruled that the story could not be believed as: (i) the alleged involvement of Badrul Hisham and his two friends was never put to the prosecution's witnesses; and (ii) the same story

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was not stated in the two cautioned statements the appellant gave to the police. The learned judge was also of the view that the fact that the appellant had not adduced the first of the cautioned statements showed that the appellant, in that first cautioned statement, did not advert to his lack of knowledge of the drugs.

I

These failures, according to the learned judge, had not only invited adverse inferences against the appellant but also rendered his evidence lacking in credibility. The appellant appealed and the main

issue that arose was whether the manner in which the learned judge appreciated the appellant's evidence herein was flawed, and in any case constituted a serious misdirection in law.

Held (allowing appeal; acquitting and discharging appellant) Per Gopal Sri Ram JCA delivering the judgment of the court:

(1) It is settled law that there is no duty on an accused to make any statement whether cautioned or otherwise to the police whether upon or after his arrest. Accordingly, no adverse inference may be drawn against an accused for not making a statement to the police after his arrest. (para 7)

(2) The learned judge disbelieved the defence story partly because the existence of Badrol Hisham had not been put to PW5. However, that would be quite a useless exercise because PW5 in his testimony said he did not remember the names of any of the persons arrested at the toll plaza on the night in question. Further, the added fact that it was never put to the appellant under cross-examination that Badrol Hisham did not exist must also be taken into account when assessing the credibility of the defence case. That unfortunately was not done by the trial judge. Accordingly, her comment on the lack of credibility of the appellant's evidence is not beyond criticism. (paras 8 & 9)

(3) There is a serious misdirection by the trial judge when she came to the conclusion that the appellant had failed to inform the police of the existence of Badrol Hisham or of his role in the case when a cautioned statement was first recorded from him by one Insp Khairul Azhar. She came to the conclusion on the assumption that the statement did not contain the disclosure because the defence had not sought to adduce it at the trial. With respect, such direction imposed upon the appellant a duty to speak which the law does not impose upon him. Such observation of the trial judge therefore constitutes a serious misdirection. As we already said, no adverse inference may be drawn against an accused for remaining silent upon his arrest. (paras 10 & 11)

(4) The learned judge also drew an inference that the appellant had in fact not mentioned Badrol Hisham because had such mention been made, counsel having conduct of the defence would have put it in evidence. This is pure speculation. It clearly constitutes the drawing of an adverse inference against the appellant for non-production of his cautioned statement. Just as no adverse inference may be drawn from the failure of an accused to call a material witness, so too no such inference may be drawn from his failure to put his cautioned statement in evidence. This misdirection, to borrow the words of Edgar Joseph Jr. in *Alcontara v. PP*, has seriously weakened the case for the appellant in the eyes of the judge. More, it prejudiced the appellant and occasioned a substantial miscarriage of justice. (para 15)

(5) If the learned judge had properly directed herself on the law and the facts before her, she would have come to the conclusion that the prosecution had failed, at the end of the whole case, to prove beyond reasonable doubt the element of *mens rea* possession which is an essential ingredient of the offence with which the appellant was charged. The appellant was hence entitled to an acquittal. (para 17)

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah disabitkan dengan kesalahan mengedar 48666 gram ganja di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 dan dihukum mati apabila dadah terlarang tersebut dijumpai di dalam kereta yang dipandu olehnya. Yang arif hakim, dalam menolak pembelaan perayu bahawa beliau hanyalah seorang pembawa tidak berdosa dadah tersebut, dan bahawa ketiga-tiga guni ganja tersebut mungkin diletakkan di dalam but kereta oleh seorang Badrol Hisham atau dua orang kawannya atau oleh orang yang memberi maklumat kepada SP5 – memutuskan bahawa cerita tersebut tidak boleh dipercayai kerana: (i) keterlibatan Badrol Hisham atau dua orang kawannya atau pemberi maklumat polis seperti yang didakwakan tidak pernah diajukan kepada mana-mana saksi pendakwa; dan (ii) cerita yang sama tidak wujud di dalam dua kenyataan beramaran yang diberikan perayu kepada polis. Yang arif hakim juga berpendapat bahawa fakta bahawa perayu tidak mengemukakan kenyataan beramarannya yang pertama menunjukkan bahawa perayu, di dalam kenyataan beramaran tersebut, tidak membangkitkan soal beliau tidak mempunyai

pengetahuan tentang dadah. Kegagalan-kegagalan ini, menurut yang arif hakim, bukan sahaja membolehkan inferens memudaratkan di buat terhadap perayu tetapi juga menjadikan keterangannya sebagai tidak boleh dipercayai. Perayu merayu dan isu penting yang berbangkit adalah sama ada cara yang arif hakim menangani keterangan perayu di sini adalah cacat, atau merupakan salah arahan serius di sisi undang-undang.

Diputuskan (membenarkan rayuan; membebas dan melepaskan perayu):
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah

(1) Sudah menjadi undang-undang mantap bahawa semasa atau selepas ditangkap, seseorang tertuduh tidak memikul apa-apa tanggungjawab untuk membuat kenyataan sama ada beramaran ataupun tidak. Oleh itu, tiada inferens memudaratkan boleh diambil terhadap tertuduh kerana gagal membuat kenyataan kepada polis selepas penangkapannya.

(2) Yang arif hakim tidak mempercayai cerita pembelaan antara lain disebabkan kewujudan Badrol Hisham tidak ditanyakan kepada PW5. Bagaimanapun, itu adalah satu tindakan yang sia-sia kerana PW5 dalam keterangannya menyatakan bahawa beliau tidak ingat nama-nama mereka yang ditangkap di plaza tol pada malam berkenaan. Selain itu, fakta lanjut bahawa ianya tidak pernah diajukan kepada perayu semasa soalan balas bahawa Badrol Hisham sebenarnya tidak wujud harus juga diambilkira apabila menilai kredibiliti kes pembelaan. Malangnya ini tidak dibuat oleh hakim bicara. Ianya mengikut bahawa komentar hakim bicara bahawa keterangan perayu ketandusan kredibiliti tidak boleh terlepas dari kritikan.

(3) Hakim bicara telah melakukan satu salah arahan serius apabila membuat rumusan bahawa perayu gagal memberitahu polis mengenai kewujudan Badrol Hisham atau mengenai peranannya di dalam kes semasa kenyataan beramaran yang pertama direkodkan darinya oleh seorang Insp Khairul Azhar. Beliau membuat rumusan ini berdasarkan andaian bahawa kenyataan beramaran tidak mengandungi pendedahan tersebut kerana tiada percubaan di pihak pembelaan untuk mengemukakannya di perbicaraan. Dengan hormat, arahan sedemikian telah meletakkan ke atas perayu satu tanggungjawab untuk bercakap yang tidak dikenakan oleh undang-undang terhadapnya.

A Pemerhatian oleh hakim bicara tersebut, dengan itu, merupakan satu salah arahan serius. Seperti yang kami telah nyatakan, tiada inferens memudaratkan boleh dibuat terhadap seorang tertuduh kerana berdiam diri semasa tangkapannya.

B **(4)** Yang arif hakim juga membuat inferens bahawa perayu sebenarnya tidak menyebut mengenai Badrol Hisham kerana jika beliau ada menyebutnya, maka peguam yang menyelia pembelaannya seharusnya akan membangkitkannya sebagai keterangan. Ini semata-mata satu spekulasi. Ia adalah
C pengambilan inferens memudaratkan terhadap tertuduh kerana kegagalan mengemukakan kenyataan beramarannya. Sama seperti tiada inferens memudaratkan boleh dibuat terhadap tertuduh kerana gagal memanggil saksi material, maka inferens memudaratkan juga tidak boleh dibuat atas kegagalannya
D mengemukakan kenyataan beramarannya sebagai keterangan. Salah arahan ini, meminjam kata-kata Edgar Joseph Jr di dalam *Alcontara v. PP*, telah dengan seriusnya melemahkan kes perayu pada pandangan yang arif hakim. Lebih dari itu, ia memprejudiskan perayu dan menyebabkan salah laksana
E keadilan.

(5) Jika yang arif hakim mengarahkan dirinya dengan betul di sisi undang-undang dan fakta yang ada di hadapan beliau, beliau tentu akan mencapai rumusan bahawa pendakwaan, di akhir
F keseluruhan kes, telah gagal membuktikan tanpa keraguan munasabah elemen *mens rea* milikan, yang merupakan satu ingredien penting bagi kesalahan yang dipertuduhkan ke atas perayu. Perayu, dengan hal yang demikian, berhak untuk dibebaskan.

G **Case(s) referred to:**
Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 FC ***(refd)***
Mohamad Din v. PP [1985] 2 MLJ 251 ***(refd)***
Mraz v. Queen [1955] 93 CLR 493 ***(refd)***
PP v. Badrulsham Baharom [1988] 2 MLJ 585 ***(refd)***
H *PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC* ***(refd)***
Rattan Singh v. PP [1971] 1 MLJ 162 ***(refd)***
Tan Foo Su v. PP [1967] 2 MLJ 19 ***(refd)***
Teng Boon How v. PP [1993] 4 CLJ 545 SC ***(refd)***
Wong Nam Loi v. PP [1998] 1 CLJ 37 CA ***(dist)***
Wong Swee Chin v. PP [1981] 1 MLJ 212 ***(refd)***
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Legislation referred to:
Dangerous Drugs Act 1952, s. 39B(1)(a)

Other source(s) referred to:
Sarkar on Evidence, 16th edn, p 148

For the appellant - Hisyam Teh Poh Teik; M/s Teh Poh Teik & Co
For the respondent - Jamhirah Ali, DPP

[Appeal from High Court, Pulau Pinang; Criminal Trial No: 45-7-2001]

Reported by Wan Sharif Wan Ahmad

JUDGMENT

Gopal Sri Ram JCA:

[1] This is the judgment of the court.

[2] The appellant before us was convicted of an offence of trafficking contrary to s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act) and sentenced to death. The brief facts relevant to this appeal are as follows.

[3] PW5 (ASP Foo Chee Lip) acting on information he received laid an ambush at the Sungai Dua toll plaza on 28 December 1999 at about 9.30pm. A short while later he noticed a Proton Wira motorcar No. WGT 8794 approaching him. When the car arrived at the toll plaza, PW5 and his team of police officers approached it and identified themselves. The appellant was in the driver's seat. On seeing the police the appellant put up both his hands. PW5 noticed that the appellant was shivering. The appellant was then arrested. PW5 entered the car and observed a strong smell of ganja. A search of the motorcar's trunk revealed 3 gunny sacks of a substance which upon subsequent chemical analysis found to be 48666 grams of ganja, a drug proscribed by the Act. Later the appellant was charged at the High Court of Penang. At the close of the prosecution's case, his defence was called upon and at the close of the whole case he was found guilty as charged.

[4] The main, if not the only, ground of complaint before us is that the learned trial judge failed to judicially evaluate or appreciate the defence evidence. Now, the case for the defence was this. The appellant had taken the car in question and gone to Alor

A Setar and then on to Gurun. His purpose was apparently to locate some used clothes of which he claimed to be a trader. During his journey he was accompanied by a man called Badrol Hisham. At Gurun both the appellant and Badrol Hisham stopped at a rest stop to break their fast. According to the appellant he
B handed the car keys to Badrol Hisham. Later at a car park not far from where they had had broken their fast, they were joined by two friends of Badrol Hisham. There were two other vehicles as well. One was a Perodua Kancil and the other a Honda Civic. All three vehicles then proceeded towards Sungai Dua. Badrol
C Hisham travelled in the Perodua Kancil.

[5] It is common ground that during PW5's cross-examination it was never put to him by counsel for defence in the court below that Badrol Hisham had played a role in the case. This omission
D was considered at some length by the learned trial judge in her judgment. Here is the first passage:

> The court disbelieved the defence story about Badrol Hisham and Badrol Hisham's two friends and about the accused giving the car key to Badrol Hisham and about following the cars of Badrol
E Hisham and his two friends because they were never put to the prosecution's witnesses. This story is also not stated anywhere in the accused's second cautioned statement, D29.
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> The defence had only cross-examined SP5 on the following:
>
F (1) the detention of a Kancil prior to the detention of the Proton Wira driven by the accused;
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> (2) that there were two Malay men in the Kancil;
>
> (3) that the 2 Malay men were arrested in connection with drugs
G in the Kancil;
>
> (4) that the two Malay men were arrested and brought to the car park of the Toll Plaza;
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> (5) that after the arrest of the two Malay men but before the
H arrest of the accused there was another car, namely, a Honda Civic which was detained;
>
> (6) that the Honda Civic was detained at 9.43pm on 28th December 1999;
>
I (7) that a Malay man in the Honda Civic was also arrested;

(8) that the name of the Malay man in the Honda Civic was Abdul Aziz;

(9) that the Proton Wira driven by the accused was detained at 9.44 pm on 28th December 1999; and

(10) that when the accused was brought to the car park of the Toll Plaza the other Malay men who had been arrested earlier were already brought there.

Although the learned defence counsel had informed the court that he needed to put further questions/suggestions to SP5 that the other persons who were arrested were involved in putting the cannabis in the Proton Wira which was driven by the accused and the court had informed him that the defence could put questions to this effect only to SP5, the defence for reasons best known to themselves must have decided otherwise because thereafter the defence neither put this question/suggestion nor any other question/suggestion to SP5 to this effect.

At no point of time did the defence put to SP5 that it was Badrol Hisham or Badrol Hisham's friends who had placed the cannabis in the car. Neither did the defence put to SP5 that one of the two Malay man in the Kancil was Badrol Hisham and that the other Malay man in the Kancil and also the Malay man in the Honda Civic were the friends of Badrol Hisham.

[6] There is a second passage in the judgment of the learned judge which we think requires reproduction. It reads as follows:

In the instant case, the accused's defence is that he is an innocent carrier and that the 3 gunny bags of cannabis could have been put in the boot of the car by the accused's friend Badrol Hisham or Badrol Hisham's two friends or the informer who tipped off SP5. Yet when he was arrested by the police he did not inform the police of this. A cautioned statement was recorded from him at the car park immediately after he was arrested. That was another opportunity for the accused to tell Insp. Khairul Azhar of his lack of knowledge of the drugs. The court can assume that he did not do so because the defence has chosen not to adduce that cautioned statement but a subsequent cautioned statement, D29.

It is significant that in D29 the accused has mentioned that upon being questioned by one of the police officers whether he had carried anything that was illegal in his car he replied that here was nothing illegal in his car. Yet this reply was never put to SP5 nor to SP6. Thus the only inference is that this part of D29 is not true. In D29 the accused also confirmed the evidence of SP5 and

A SP6 when he stated that a cautioned statement was recorded from him at the car park of the Toll Plaza although according to the accused the cautioned statement was recorded after the police found the drugs in the boot of the car.

B **[7]** Before we make any comment on the learned judge's approach to the defence case in the foregoing paragraphs we would make the following comments. First, in the instant case, when the appellant gave his evidence about Badrol Hisham it was never put to him that such a person did not exist and that he was a figment of the appellant's imagination. Second, PW5 when
C he gave his evidence said that he could not remember the names of the other persons who had been arrested shortly before the appellant. We would pause here to mention that it is common ground that a few minutes before the appellant's car was stopped and he arrested, two other cars, a Perodua Kancil and Honda
D Civic had also been stopped and its occupants arrested. It is also not disputed that drugs were recovered from the Perodua Kancil. Third, we accept as settled law that there is no duty on an accused to make any statement whether cautioned or otherwise to
E the police either upon or after his or her arrest. Accordingly, no adverse inference may be drawn against an accused for not making a statement to the police after his or her arrest. Although there are a number of authorities that support this proposition we consider it sufficient to refer to only one of them. In *Rattan Singh*
F *v. Public Prosecutor* [1971] 1 MLJ 162, the learned President of the Sessions Court had construed the accused's silence as pointing to his guilty mind. In quashing the conviction on appeal, Syed Agil Barakhbah J (as he then was) said:

G It has been held in a series of cases by the Court of Criminal Appeal in England that it was improper for the judge to invite the jury to make an inference against the accused person for his refusal to make a statement or for keeping silent after the caution had been administered. (See *R v. Norman Davis* 43 Cr App R 215, *R v. Naylor* 23 Cr App R 177, *R v. Leckey* 29 Cr App R
H 128, etc.). In all these cases, it was held that such inference amounted to a misdirection and the conviction in each case was quashed. In *Satkuru v. Public Prosecutor* FM Criminal Appeal No 12 of 1960; (unreported), the Court of Appeal quashed the conviction of the appellant on similar but much stronger grounds. There was however an oral judgment delivered, but from the
I written additional grounds of appeal and notes on record, it

appeared that the learned trial judge in his grounds of judgment criticised the accused for his failure to give his version of the facts which he gave in evidence at the time he was arrested and at the preliminary enquiry **notwithstanding the fact that the learned trial judge subsequently stated that he was putting it out of consideration**. The English authorities cited appeared to have been followed. (emphasis added)

[8] We now turn to deal with the learned judge's direction in the passages already quoted about which complaint has been made before us. Now it is clear that the learned judge disbelieved the defence story partly because the existence of Badrol Hisham had not been put to PW5. Learned counsel for the appellant has submitted that this would be a quite a useless exercise because PW5 did not remember the names of any of the persons arrested at the toll plaza on the night in question. We think there is merit in this submission. The failure to cross-examine a prosecution witness on material points has the effect of casting a doubt upon the credibility of the defence, see *Wong Swee Chin v. Public Prosecutor* [1981] 1 MLJ 212.

[9] In the present case the added fact that it was never put to the appellant under cross-examination that Badrol Hisham did not exist must also be taken into account when assessing the credibility of the defence case. That unfortunately was not done by the learned trial judge. Accordingly her comment on the lack of credibility of the appellant's evidence is not beyond criticism.

[10] Further, there is a serious misdirection by the learned judge in the passages already quoted. It is to be noted that the learned judge came to the conclusion that the appellant had failed to inform the police of the existence of Badrol Hisham or of his role in the case when a cautioned statement was first recorded from him by one Insp. Khairul Azhar. She came to that conclusion on the assumption that the statement did not contain the disclosure because the defence had not sought to adduce it at the trial.

[11] With respect, the aforesaid direction of the learned judge imposed upon the appellant a duty to speak which the law does not impose upon him. It is for this reason that we consider the observation of the learned judge on the point under consideration to be a serious misdirection. As we have already said, no adverse inference may be drawn against an accused for remaining silent upon his arrest.

[12] In coming to the conclusion that the appellant's silence was to be held against him the learned judge relied on *Wong Nam Loi v. Public Prosecutor* [1998] 1 CLJ 37 CA, which she said was a decision of the Supreme Court when it is not. It is in fact a judgment of this court. According to the learned judge the conviction in that case was upheld on a finding by the trial judge there that to quote her words:

> .. the accused had knowledge of the contents of the refrigerator based on, *inter alia*, the fact that the accused remained silent, made no protest nor exhibited any conduct consistent with his lack of knowledge of the drugs.

[13] However, a careful reading of that case shows that the accused there did not remain silent. On being arrested by the police he had told them that if there was anything illegal it was in the refrigerator. *Wong Nam Loi* was accordingly not a case where the accused had remained silent. The learned judge was therefore clearly wrong in treating as analogous to the facts of the present instance.

[14] With respect, we consider the learned judge's direction here to be similar with the approach adopted by the judge in *Teng Boon How v. Public Prosecutor* [1993] 4 CLJ 545. In that case, the trial judge had, among other things, criticised the accused on his failure to disclose to the police, by way of a cautioned statement, the name of the taxi driver who was a vital witness for the defence. It was also a case under s. 39B(1)(a) of the Act. In quashing the conviction on appeal, Edgar Joseph Jr SCJ said this:

> Be that as it may, the judge failed to recognize, firstly, that the appellant had a right to silence when interrogated by the police, whether before or after being cautioned. Indeed, the terms of the statutory caution under proviso (b) to s. 37A(1) of the Dangerous Drugs Act 1952 merely reminds him of a right he already has at common law to refrain from answering a question put to him for the purpose of discovering whether he has committed a criminal offence. (Per Lord Diplock in *R v. Hall* [1971] 1 WLR 298). The exception to this rule, is where the defence of the accused is an alibi (see the statutory obligation on an accused to give notice to the prosecution of a defence of alibi under s. 402A of the Criminal Procedure Code (FMS Cap 6). Even prior to the introduction of s. 402A of the Criminal Procedure Code (FMS Cap 6), an alibi defence was an exception to the rule that it is

improper for a judge to make any adverse comment on the failure of an accused to disclose his defence until the trial. (See, eg *R v. Chhui Yi* [1936] MLJ 142 and *Fazal Din v. Public Prosecutor* [1949] MLJ 123). A

Secondly, although a judge may properly comment that an explanation has been given for the first time at the trial, this has to be done with care and fairness to the accused in all the circumstances of the case. (See *R v. Ryan* [1973] 2 NZLR 611) The Privy Council and English authorities show that the dividing line between what is fair comment and what is not, has been recognized to be a fine one. (See 11 *Halsbury's Laws of England* (4th Ed) para 299; *Archbold Pleading Evidence and Practice* (1992) paras 4-407.) B C

It has been said that there is a clear distinction between drawing an inference of guilt from prior silence and taking into consideration such silence as diminishing the weight of any explanation given by the accused for the first time at the trial. However, as Lord Dilhorne, speaking for the Court of Appeal in *R v. Gilbert* [1977] 66 Cr App R 237 rightly pointed out, there is no clear dividing line, as in each situation the jury are invited to draw an inference adverse to the accused on account of his exercise of the right to silence. It follows that, in practice, the distinction is too fine to be of any practical value even if the trial is before a judge sitting alone. D E

Where the judge takes into consideration the belatedness of an explanation offered by an accused for the first time at the trial as diminishing the weight of that explanation, this will usually not be fair unless he makes it clear that he recognizes the right of the accused to remain silent and that he is not drawing an inference of guilt from such silence. No particular form of words is necessary, provided his mind on the matter is clearly revealed in his judgment. In the present case, the judgment of the judge clearly suffers from these defects and so there was clearly a misdirection on this score. F G

[15] In the present instance the learned judge with respect went further than did the trial court in *Teng Boon How*. *Teng Boon How* was a case in which there was a proved omission by the accused to mention the name of the taxi driver in question. Here, there was no such proof at all. As may be seen from the passage earlier quoted from the judgment under appeal, the learned judge in the present case drew an inference that the appellant had in fact not mentioned Badrol Hisham in the cautioned statement because had H I

such mention been made, counsel having conduct of the defence would have put it in evidence. This is pure speculation. It clearly constitutes the drawing of an adverse inference against the appellant for non-production of his cautioned statement. Just as no adverse inference may be drawn from the failure of an accused to call a material witness (see, *Tan Foo Su v. Public Prosecutor* [1967] 2 MLJ 19), so too no such inference may be drawn from his failure to put his cautioned statement in evidence. To borrow the words of Edgar Joseph Jr SCJ in *Alcontara Ambross Anthony v. Public Prosecutor* [1996] 1 CLJ 705 – words which are of immediate applicability here – "As a result of this misdirection, the case for the appellant must have been seriously weakened in the eyes of the judge, and the chance of his attaching any degree of credence to it seriously prejudiced." We would add that this serious misdirection by the learned judge has prejudiced the appellant and occasioned a substantial miscarriage of justice.

[16] It was submitted by the learned DPP in an attractively formulated argument that the serious misdirection on the part of the learned judge when assessing the appellant's evidence were *de minimis* and did not render the conviction unsafe. She also argued that the errors, if any, had been occasioned through a failure on the part of the counsel for the appellant in the court below to properly conduct the defence. With respect, we do not agree with these arguments. In the first place, the test to be applied as in case in the present is whether there has been a misdirection which has deprived an accused of a chance which was fairly open to him of being acquitted, see *Mohamad Din v. Public Prosecutor* [1985] 2 MLJ 251, quoting from *Mraz v. Queen* [1955] 93 CLR 493. In the second place, the errors were made by the learned judge in the handling of the facts and in the approach to the defence case. As for the argument that it was counsel who was to be blamed, let it be so. Let it be that an accused is unrepresented or represented by less than an adequately competent counsel. Yet, that does not relieve a court trying a criminal charge of directing itself correctly on the facts and the law. For, the question at the end of the day for a court of criminal appeal is whether the conviction entered is safe. Once it finds a conviction unsafe, this court must intervene. On this point we can do no better than to quote from *Sarkar on Evidence* 16th edn p. 148:

> The sound rule to apply in a criminal appeal is to consider whether the conviction is right and in this respect it differs from a civil appeal. In the latter case the court must be convinced before reversing a finding of fact that the finding is wrong (*Pratap v. Emperor*, 11 CLR 25). The duty of the court is not similar to that in a civil appeal. The standpoint is not whether the decision is wrong, but whether the conviction is right. In the case of any doubt the order should be set aside *Milan v. Sagai*, ILR 23 C 347; *Kanchan v. Emperor*, 18 CWN 1215: ILR 42 C 374; *Md Husain v. Emperor*, AIR [1945] Nag 441: AIR 1945 N 116; see *Emperor v. Madhub*, 21 WR Cr 13, 19; *Ibrahim v. Emperor*, 47 CWN 332; *Nga Kyaw v. Emperor*, 39 Cri LJ 2481.

[17] In the present case, the gist of the appellant's defence was that he had no knowledge of the proscribed drug which was in the trunk of his car. That was the question which the learned judge had to determine. It is in determining that question that she made the errors she did and to which we have adverted earlier in this judgment. In our judgment, if she had properly directed herself on the law and on the facts that were placed before her, she would have come to the conclusion that the prosecution had failed, at the end of the whole case, to prove beyond reasonable doubt the element of *mens rea* possession which is an essential ingredient of the offence with which the appellant was charged: *Public Prosecutor v. Badrulsham bin Baharom* [1988] 2 MLJ 585; *Public Prosecutor v. Mohd Radzi bin Abu Bakar* [2006] 1 CLJ 457 (FC). Put differently, a judicial appreciation of the defence evidence would have led a reasonable tribunal properly directing itself on the law and the facts to conclude that the appellant had raised a reasonable doubt on the crucial ingredient of *mens rea* possession thereby entitling him to an acquittal.

[18] For the reasons already given we are satisfied that the conviction of the appellant is manifestly unsafe. We are therefore left with no alternative but to intervene and set it aside. The appeal is accordingly allowed, conviction is quashed and the sentence set aside. The appellant shall be set at liberty forthwith.